

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 11 OF 2007

BETWEEN:

JANE FINCH

Employee

VS

RENDEZVOUS COMPANY

Employer

Before:

The Hon. Genevieve L.I. Benjamin

Chairman

The Hon. Jessie Kentish

Member

The Hon. Oscar Frederick

Member

Appearances:

**Mr. Egbert Joseph of the Antigua Hotel Management Association
for the Employee and**

**Mr. Cosbert Cumberbatch of Cumberbatch & Associates –
Attorneys-at-Law for the Employer**

2008: November 6, 13, 20

2009: March 16

2010: April 26

JUDGMENT

BENJAMIN, G.:

Contract signed on August 28, 2006, for seven (7) months, effective “*5th October, 2006, through to the end of April 2007*” – employment terminated October 25, 2006 – claim of unfair dismissal.

LEGAL PROCEEDINGS

1. This Reference was filed on October 17, 2007, by the Employee giving notification of the existence of a trade dispute between herself and the Rendezvous Company. The issue in dispute is stated as ***“Dismissal”***.
2. In her Memorandum the Employee claimed:-
 - “1. Full payment of my contract for seven (7) months***
 - 2. Compensation for unfair dismissal***
 - 3. Loss of earnings.”***
3. The Employer’s Witness Statement was dated November 25, 2008. It was filed on November 27, 2008. In this Statement the Employer expressed the view that the dismissal was not unfair. It prayed the Court to dismiss the Employee’s claim.

THE EMPLOYEE’S EVIDENCE

4. Jane Finch (**hereinafter referred to as “the Employee”**) gave sworn evidence. She stated that she lives at Piccadilly in the Parish of St. Paul in Antigua. She identified the document ***“Evidence of Jane Finch”*** dated December 24, 2007, which was filed on January 09, 2008. She recalled signing the said document. This signed document was produced to the Court. Apart from the signature it was identical to the filed document. It was accepted as the Employee’s Witness Statement in place of that document which was filed on January 09, 2008.

5. The Rendezvous Company is a registered local limited company in Antigua and Barbuda. The Company was incorporated on December 05, 1996.
6. The Employee stated that she was employed by the Rendezvous Company as Tour Coordinator under a contract which was signed on August 28, 2006 “**JF1**”. This contract provided for employment with effect from October 05, 2006, and *“the expiry date would be at the end of April 2007 which meant seven (7) months in total.”* Her employer and the Director of the Company was Mr. Neil Keeling. She listed, among her duties – *“communicating with ships (by e-mail), coordinating tours with the ships (by e-mail), staff scheduling, staff training, venue consultancy, dispatching tours from the pier, co-ordinating taxis, dispatches for departures and arrivals and returns to ships, and ship payments.”* The contract provided for payment to her of a gross monthly salary of E. C. \$6,750.00
7. The Employee told the Court that she had never discussed the job **“per se”** with Mr. Keeling, but that she knew what the job entailed. She followed the **“list”** given to her. She did not experience any problems pertaining to the job.
8. In response to questions from the Court the Employee admitted that during her short employment with the Rendezvous Company there had been **“little differences”** between herself and taxi drivers, but **“nothing major”**.
9. The Employee gave evidence that on October 25, 2006, she received an e-mail from Mr. Keeling. He informed her that her services were no longer required by the Company. She responded, also by e-mail, inquiring of the

“grounds” for her termination. In reply she was advised that a letter of termination would be sent to her. She did receive such a letter – again by e-mail – from Mr. Keeling. This e-mail was admitted into evidence as **“JF2”**. She received no other official letter of termination.

10. Later, in response to questions from the Court, the Employee said that, contrary to her previous statement that the first e-mail that she received from the Employer was on October 25, 2006, she now recollected that it was on October 24, 2006, that she received the e-mail from Mr. Keeling telling her not to report on October 25, 2006. As a consequence she telephoned and informed him that she would require the termination in writing. He then responded by e-mail on October 25, 2006.

11. The Employee stated that between October 05 and 25, 2006 there was no discussion or any other communication between Mr. Keeling and herself concerning any complaints he might have received from anyone. She had seen him and spoken with him on October 24, 2006, which **“was a very smooth day”**. He did not mention budgetary constraints or a re-structuring of the Company as suggested in the letter of termination. She was therefore shocked when she received the e-mail.

12. The Employee told the Court that under the terms of the contract **“JF1”** she was not restricted to work with the Employer company only but that when she **“got into full swing with (the Rendezvous Company she) did not work with anybody else”**. In response to Mr. Cumberbatch, Ms. Finch stated that she did not seek employment elsewhere for two reasons. Firstly, she was

busy with her current work and secondly, there were no extra ships to work with.

13. She said that at the time of her termination most companies in the business already had their required personnel in place as the high season in the cruise industry is between December and May. After her termination she continued to freelance, but was unable to obtain employment until the first or second week in December, 2006. She was ***“struggling at that time, maybe working two (2) or three (3) days a week.”*** She estimated that her monthly salary after her dismissal was approximately \$2,000 to \$2,500. She added that this situation continued up to the date of the hearing of this matter.

14. Under cross-examination the Employee disagreed that she had worked for five (5) days only for the Employer. She stated that during her employment with the Rendezvous Company she did spend only five (5) days physically at the pier, but that she had spent much time working for the Employer at home in the co-ordination of some 45 tours.

15. Contrary to the evidence in her Witness Statement that she ***“never received any monies or any of the agreed incentives that were in the contract”*** the Employee recalled in oral evidence that she had received the first half month’s salary of approximately \$3,375 while working.

16. Ms. Finch stated that although the contract had provided for the refund to her of certain expenses, which included APUA telephone bills, phone cards,

and land travel in supervising tours, she had neither been invited to submit such bills nor had she done so.

17. Under cross-examination the Employee confirmed that she had been invited to attend a meeting to discuss what she thought were work-related matters. These included the requirements of the tour guests. It was a meeting scheduled by Mr. Keeling. Ms Finch did not provide the date or place of meeting. She said that when she attended, another member of the Company, Ms. Etherington, was present and Mr. Keeling was not. She denied walking out of the meeting. She said that she left because she could not accept the verbal assaults on her character that Ms. Etherington was making. No *“meeting”* took place.

18. Ms. Finch stated that she has been acquainted with Mr. Keeling and Ms. Etherington for some fifteen to twenty years. She knew that Ms. Etherington was involved in the Company. She did not know that she was a director of the Company. Under re-examination the Employee said that it was her understanding that she *“reported to Mr. Keeling and no one else”*.

19. In responding to the Court the Employee said that having worked with the Company under an earlier contract, when she signed the contract in question **“JF1”** she believed that she would be working with the Company for seven (7) months with a review after April, 2007. She understood that *“the period of notice on each side to be one month”* provided in the contract, could be applicable to notice of dismissal for cause.

THE EMPLOYER'S EVIDENCE

20. Neil Keeling gave evidence for the Company. He stated that he lives at Paradise View, in the Parish of St. John in Antigua. He is one of the owners and one of the directors of the Rendezvous Company.
21. Mr. Keeling confirmed that he signed a Witness Statement dated November 25, 2008. He caused this Witness Statement to be filed in the Court on November 27, 2008. This Statement, he said, is his Evidence in Chief.
22. He acknowledged the contract letter dated 23rd August, 2006. This contract, he said, was signed by Jane Finch and himself on August 28, 2006 **"JF1"**.
23. He stated that Ms. Finch was employed in a freelance position by Rendezvous Company as a Tour Co-ordinator. The contract stipulated ***"The period and details of the arrangement to be mutually reviewed by 30th April, 2007 and the period of notice on each side to be one month."*** She ***"worked five days only.... and co-ordinated fifteen tours"*** on behalf of the Company.
24. He gave evidence that complaints were received from the Company's clients ***"as to Ms. Finch's behaviour and attitude."*** In this connection two letters were admitted into evidence:-
- i) Letter from St. John's Taxi Association dated 11th January, 2008 **"NK3"**.

- ii) Letter from Sandhaven Beach Bar & Restaurant dated 13th February, 2008 “NK4”.

25. It was stressed in re-examination by Mr. Cumberbatch that although the complaint letters are dated after the termination they dealt with the period of employment.

26. Following the receipt of these complaints Ms. Finch was asked, he said, *“to attend a meeting with a director of the company, Melanie Etherington, who wished to discuss these serious matters of her attitude and behaviour. At the meeting Ms. Finch denied any wrongdoing, advised Ms. Etherington that there were no problems. She stated that ‘this is not a meeting but a character assassination’ and stormed out of the meeting.”* Mr. Keeling acknowledged that he was not present at the meeting but stated that Ms Etherington gave him details of the meeting. He did not consider it necessary to discuss the matter with Ms. Finch.

27. Mr. Keeling for the Employer stated that Ms. Finch has known Ms. Etherington for between 20 to 25 years. Ms. Etherington, he said, is the person referred to as *“Melanie”* at **paragraph (g)** of the contract to whom all *“negatives”* could be reported. Ms. Finch was aware that she was to report either to Ms. Etherington or to himself. Further, he said, when the employment was being offered to the Employee it was made clear orally that there were two shareholders and two directors.

28. Mr. Keeling stated that he spoke with Miss Finch on October 25, 2006. He *“advised her that the company would no longer be requiring her services*

due to budgetary constraints and that (the Company) would be giving her a month's notice per (their) agreement." An exchange of e-mails "NK1" and "NK2" followed this telephone call. The letter of termination "JF2" was also sent by Mr. Keeling to the Employee. Subsequently a signed, hard copy of the termination letter was sent to the Employee "NK5". This letter, which is identical to the e-mail "JF2" reads as follows:

"THE RENDEZVOUS COMPANY

P.O. Box W1245, Woods Centre, St. John's, Antigua

Tel: (268) 560 8484 Fax: (268) 560 7965 E-mail: rendezvu@candw.ag

Jane Finch

Piccadilly

Cobbs Cross

Antigua

25th October 2006

Dear Jane,

Further to our telephone conversation earlier today, this to confirm that we will be terminating your agreement with our company effective of today's date.

Following discussions with several suppliers we have taken the decision to have a director of the company to work in your role and, as such, we have no available budget for 2 persons in the same role.

As discussed we will be paying you until 31st October 2006 (and not until 25th October 2006) and we will also pay you one month's monies, November 2006, in lieu of notice.

Under the terms of our agreement we would naturally require the return of all property of the company including all relevant paperwork, signs, shirts, name badge and belongings. We would also expect you to keep all our business matters confidential.

We wish you well in your future endeavours.

Yours sincerely,

(Sgd)

Neil Keeling

Director”

29.Mr. Keeling said that following the complaints *“a decision was taken to restructure the operation of the company and the employee was not replaced but became redundant.”*

30.He stated that the period of one month’s notice provided at paragraph (m) of the contract did not refer to the possible renewal of the contract at the end of April, 2007, but to the period of the contract, i.e., October, 2006 to April, 2007. If either party wished to end the contract one month’s notice was required.

31.The Employer stated that Ms. Finch was paid fortnightly at her request, and received one payment of \$3,375.00 for the first two weeks of employment.

32.It was his evidence that she co-ordinated fifteen tours only during the period of her employment. He listed the cruise lines she worked on and the number of tours per cruise line. This information was important, he said, to demonstrate the credibility of the Employee.

33.Under cross-examination Mr. Keeling confirmed that early on October 25, 2006, he called Ms Finch to let her know that the Company would not be

requiring her services. This was so because one of the Company directors would be assuming her role and there was not the budget to pay two people. It was a difficult call to make, he said, in view of his long association with her.

34. He stated that upon receiving legal advice the job was made redundant. He confirmed that the reason given to the Employee for the termination was *“budgetary constraints”*.

35. He also confirmed that a director of the Company assumed the role of Tour Co-ordinator.

36. The Employer stated that to his knowledge the Employee worked with the firm of Alexander Parrish while in the employ of the Rendezvous Company.

THE EMPLOYEE’S SUBMISSIONS

37. On behalf of the Employee Mr. Egbert Joseph made the following submissions:

- i) Ms. Finch was employed on a seven-month contract as Tour Coordinator with wide-ranging responsibilities not only to organize guest tours, but, *inter alia*, training, briefing, consulting, co-ordinating, time-keeping and ensuring the proper personnel presentation and general demeanour.

- ii) Although it was a freelance position Ms. Finch's work-load did not allow her the time or opportunity to work for any other company while in the service of the Employer.
- iii) On October 25, 2006, the Employee received an e-mail from the Employer terminating the contract with immediate effect. ***"Ms. Finch was never given a dismissal letter."*** The signed letter was said by the Employer to have been slipped under her door. Such action is contrary to section 10 (1) of the Labour Code.
- iv) The reason given for the termination, namely, that following reports from its suppliers one of the directors would carry out the Employee's functions is unfair to the Employee and contrary to section C (3) of the Labour Code.
- v) The letters of complaint against the Employee which were admitted into evidence as "NK3" and "NK4" are dated two years after the termination of the Employee on 25th October, 2006.
- vi) The complaints were never discussed with the Employee.
- vii) Ms. Finch was asked to attend a meeting with Ms Melanie Etherington. Only these two persons were in attendance. It is therefore safe to assume that only these two ladies would be able to state what took place at the meeting. The date of the meeting was not given and no written minutes or notes were presented.
- viii) Following termination Ms. Finch was unable to obtain full employment. She obtained freelance employment in December, 2006 only, earning approximately \$2,500 to \$3,000 monthly. This continued until April, 2007.
- ix) He expressed the opinion that ***"Rendezvous Company used Ms. Finch because of her experience and knowledge to (set) up the tour***

operation which included training guides etc and then terminated her.”

- x) Ms. Finch *“should be awarded her full seven (7) months contract and any other award that the Court sees fit.”*

38. Mr. Joseph cited Reference No. 25 of 1990 – *“Theodore Isaac and Savoy Resorts and Management Services Inc.”* He also asked the Court to give consideration to the following Sections of the Labour Code: C2 (1), C3 and C10 (1).

39. In the case cited, Theodore Isaac was employed under a written contract which included a term *“that in order to terminate the employment either party would give the other three (3) months notice in writing”*. In his judgment, the Hon. Henry S.R. Moe, then President of the Industrial Court, found at page 2 *inter alia* as follows:

“There was a breach of this said term when the Employer by letter (see EXHIBIT TI (2) terminated the Employee’s contract of employment.

From the uncontroverted evidence before us we find that the Employer’s breach of the contract amounted to a summary dismissal of the Employee. We also find that there was no just or reasonable cause for the dismissal and in the circumstances the dismissal was unfair.

Accordingly the Employee is entitled to compensation for unfair dismissal.”

The employee in this case obtained awards for breach of three months’ notice, expenses incurred in respect of his search for alternative employment, basic

award, manner of dismissal, immediate loss of earnings, unpaid salary and costs.

THE EMPLOYER'S SUBMISSIONS

40. Mr. Cosbert Cumberbatch, on behalf of the Employer, submitted that the Employee was employed under a seven (7) month contract i.e. from October 05, 2006 through to the end of April, 2007. He said that an extremely critical term in the contract provides as follows:

"The period of this arrangement to be mutually reviewed by 30th April, 2007 and the period of notice on either side to be one month. That this period be successful and the future looks "healthy" for continued success we should discuss future joint-commitment and permanent levels in the company."

41. Mr. Cumberbatch highlighted the contract term which allowed the Employee to undertake other employment ***"when the Rendezvous Company does not have business with cruise lines in port"***. He submitted that there are aspects of the contract which suggest that the Employee ***"was on a contract for services"*** during the period of employment.

42. Mr. Cumberbatch suggests that in order to identify the intention of the parties and to see if the intention is properly expressed in the contract, careful consideration be given to the wording and content of the contract. In this regard reference was made to **Scammell & Nephew Ltd v Ouston [1941] A. C 251**. Mr. Cumberbatch submitted that in that case ***"the Court***

per Viscount Maugham took the view that ‘In order to constitute a valid contract the parties must so express themselves that their meaning can be determined with a reasonable degree of certainty. It is plain that unless this can be done it would be impossible to hold that the contracting parties had the same intention; in other words the consensus and ad idem would be a matter of mere conjecture. This general rule, however, applies somewhat differently in different cases’.”

43. He submitted that a reasonable interpretation of the relevant clause *“is that either party could within the seven month period referred to terminate the contract by giving one months notice to the other party. What is more is that it was clearly stated that the position of Tour Co-ordinator is a freelance position. This is a powerful statement and a powerful provision.”*

44. Mr. Cumberbatch contrasted this case with **Civil Appeal No. 2 of 2002 – Financial Group Ltd v Leslie Hoffman** in which the relevant contract had stipulated *“The company requires a minimum of five years commitment from you”*.

45. The Employer’s submission is that the Employee was not unfairly dismissed. Following certain discussions with its suppliers, the Employer took a decision within the seven-month period to re-structure the affairs of the company and the position held by the Employee became redundant.

THE ISSUES

46. The main issues for the Court's determination are:-

- 1. Does the contract contain a termination clause?**
- 2. If the contract does contain a termination clause, was the termination effected fairly or unfairly?**
- 3. If the termination was unfair what award should be made?**

THE LAW

47. The Law governing the matters by the parties is contained in certain relevant sections of the Antigua and Barbuda Labour Code, Cap. 27 of the Laws of Antigua and Barbuda (**hereinafter referred to as “*the Labour Code*”** and the Industrial Court Act, Cap. 214 of the Laws of Antigua and Barbuda (**hereinafter referred to as “*the Industrial Court Act*”**).

THE FIRST ISSUE

Does the contract contain a termination clause?

48. The contract reads:

“To: *Jane Finch*
 Piccadilly
From: *Neil Keeling*
Date: *23rd August, 2006*

Dear Jane,

As discussed last week, I am pleased to offer you The Rendezvous Company Tour Coordinator position with us on the following basis:

The position of Tour Coordinator is a freelance position.

- a) We will offer payment of EC\$6,750 gross per calendar month for coordination of all known tours, as of this date, on cruise ships visiting Antigua from 5th October 2006 through to the end of April 2007 i.e. 7 months in total.*
- b) We would also pay you an additional 'numbers bonus' payment based on the number of passengers handled per month on the tours. This needs to be finalized and advised to you. These payments will be made weekly in EC\$ dollars by cheque.*
- c) We would need you to liaise with our office by telephone the night before the arrival of each ship to ascertain the possible numbers for the tours we represent. Depending on numbers of passengers on the tour will determine how many representatives are required to assist you. We will liaise on the required numbers and you will make arrangements for them to be on duty at the required times and places. The required members of staff will initially report directly to you.*

We would naturally cover the costs of your APUA telephone bill and an agreed allowance for phonecards for your mobile every week during the duration of this agreement.

- d) On the day of arrival of each ship we would need you, or your appointed 'representative' to meet the respective Shore Excursion Manager and confirm the final number of passengers on the tour.*
- e) Upon receiving this number from the cruise ship, this information needs to be relayed by telephone by you to the tour location, the relevant transportation people, all those involved in the respective tour including our Guides and our office.*

- f) We would need you to liaise with the cruise line personnel, all passengers on the tour, The Rendezvous Company Guides and transportation drivers/dispatchers to ensure that the passengers are professionally, courteously and speedily dispatched on waiting transportation to the various locations.*
- g) All The Rendezvous Company Guides, as organized above, need to be advised and trained on how to conduct a simple briefing to ensure that the passengers understand what the relevant tours entail, what is included in their tour and what is not and departure times etc. You should also oversee their personal presentation, timekeeping and general manner and report any negatives to Melanie or Neil at the first opportunity.*
- h) After passengers have been dispatched from St John's, we would need you to oversee all tours at the various locations and liaise with the appointed Guides to ensure that the Cruise Line passengers enjoy the tour as is possible. The Rendezvous Company will cover your cost of this each way expense which, naturally, for cost purposes should be kept to a minimum.*
- i) We would require you to answer any queries, assist in making the day and experience as pleasurable as possible, handle any problems whilst liaising with the Guides and management of all tour locations and to document any potential problems and medical situations which may have to be reported to the Cruise Line.*
- j) We would need you to oversee the departure of all passengers back to the ship and be back at the ship in time to 'sign off' the tour numbers with the Shore Excursion Manager. The copy of the numbers and any cash payments are to be handed over to The Rendezvous Company office at the first available opportunity.*
- k) You will be responsible for your travelling expenses from home to and from St John's and any Inland Revenue, Social Security and Medical Benefit declarations.*

- l) We would naturally expect all aspects of our business and relationship to be kept strictly confidential. All polo shirts, caps, signs, pier passes would remain the property of the company and should be returned upon request.*
- m) The period and details of this arrangement to be mutually reviewed by 30th April, 2007 and the period of notice on each side to be one month. Should this period be successful and the future look 'healthy' for continued success, we would discuss future joint commitment and permanent levels with the company.*
- n) The Rendezvous Company would not have a problem should you wish to undertake other tours with other Tour Operators in Antigua on days when The Rendezvous Company does not have business with Cruise Lines in port.*
- o) Would you kindly advise me of your feelings on this proposal and hopefully your acceptance by Monday 28th August, 2006.*

We look forward to a long, mutually successful and satisfactory working relationship.

Yours sincerely

(sgd) Neil Keeling

Neil Keeling

Director

(sgd) Jane Finch

Accepted by Jane Finch

28th August 2006"

49. The Court found some difficulty in identifying a termination clause in the contract which is reproduced above. Both parties, the Employer and the Employee made reference to **paragraph (m)** of the contract, the predominant subject of which is the review of the contract arrangement at the end of the seven-month period. Almost hidden within the paragraph are the words *"the period of notice on each side to be one month."* These are the words upon which the termination appears to be based.

- 50.(a) The Court has given much consideration to this issue and recognizes that there was no misunderstanding on the part of the two parties who were involved. The Employee, in her response to the Court referred to at **paragraph [19]** above, stated that she understood the relevant section of the paragraph to mean that during the course of the seven months, the contract could be terminated for cause with a month's notice when she said that the sentence *"could be applicable to notice of dismissal for cause"*. The Employer demonstrated that this was also his understanding when he provided a reason for the termination and offered payment in lieu of one month's notice.
- (b) The Court therefore holds that the contract between the two parties provided a termination clause.

THE SECOND ISSUE

If the contract does contain a termination clause was the termination effected fairly or unfairly?

51. We turn now to an analysis of the termination itself.

52. We consider first the *"cause"*. The second paragraph of the Employer's Memorandum reads –

"It is admitted that the employee was given a letter dated 25th October, 2006 terminating her employment with the company in circumstances and for reasons specified in the said letter."

53. The said letter, “JF2” and “NK5”, states at the second paragraph:

“Following discussions with several suppliers we have taken the decision to have a director of the company to work in your role and, as such, we have no available budget for 2 persons in the same role.”

54. It was stated in evidence that complaints were received concerning the

Employee’s behaviour and attitude namely of rudeness and discourtesy *“to many of the drivers in the presence of the cruise ship passengers”* and her abuse of customers and workers *“which could lead to a potential reduction in (the company’s) client base.”*

55. In support of these complaints two letters were submitted by the Employer “NK1” and “NK2” dated January 11, 2008 and February 13, 2008 respectively. In these letters allegations of misconduct against Ms. Finch were brought by the Employer. It was noted that these letters of complaint were dated some 17/18 months subsequent to the termination.

56. The Employer provided a second-hand report of a meeting which another director is supposed to have had with the Employee purportedly to discuss these complaints. The director who is said to have conducted the meeting was not called to present evidence before the Court. No documentary evidence was submitted in support of the Employer’s second-hand report. In the Employer’s evidence at paragraph [26] above, he has no first-hand knowledge of the Employee’s side of the matter because he *“did not consider it necessary to discuss the matter with Ms. Finch”*. The Court was therefore not provided with any evidence of any investigations into the

complaints, which could only have been verbal in 2006. In these circumstances such allegations are unreliable, unfounded and unfair to Ms. Finch.

57.Mr. Keeling then proceeded to relate that *“a decision was taken to restructure the operation of the company and the employee was not replaced but became redundant.”*

58.Section C3 of the Antigua and Barbuda Labour Code defines **redundancy** as follows:

“.....a situation in which by virtue of lack of customers orders, retrenchment, the installation of labour saving machinery, an employer’s going out of business, a force majeure, or any other reason, work which a person was last employed to perform has ceased or substantially diminished.”

59.Section C58 (1) of the Labour Code states as follows:

“A dismissal shall not be unfair if the reason assigned by the employer therefor

a)

b)

c) is that the employee was made redundant;

d)

e)

Provided, however, that there is a factual basis for the assigned reason.”

60.The words of **Lord Denning M.R. in Johnson v Notts Police (1974) I.C.R. 170 (CA)** are helpful in a consideration of this matter –

“It is settled that an employer is entitled to re-organize his business so as to improve its efficiency and, in so doing to propose to his staff a change in the terms and conditions of their employment: and to dispense with their services if they do not agree The question in every case is: was the change due to a redundancy situation or not?”

61.The Court asks this very pertinent question: Was there a redundancy situation in the instant case? The Employer, in the dismissal letter, said clearly that a decision was taken to have a director of the company to work in the Employee’s role, and that there was no budget to pay two people in the same job. No documentary evidence was presented to the Court to support the claim that the company was experiencing financial difficulties. No argument or evidence was submitted to the Court to show that there was a cessation or diminution of the tasks involved in that role. The task that the employee was first employed to perform continued to exist. The court concludes that no redundancy situation existed.

62.The question of **fairness** and **manner of dismissal** now arises.

63.From the evidence before this Court received from both parties the dismissal was effected firstly by telephone on the same day that the dismissal was to be effective, and secondly by an exchange of e-mails. The Employer stated that this exchange of e-mails was followed by a signed letter “**NK-5**”, but he

has no proof of its receipt by the Employee. The Employee gave evidence that she did not receive such a letter.

64. The Employee's Representative argued in his submissions that this last action runs contrary to Section C10 (1) of the Labour Code, which reads:

“C10 (1) Upon termination by an employer of an employee's employment subsequent to the expiration of the latter's probation period, the employer shall, within seven days of the termination or notice thereof, furnish to such employee a written statement of the precise reason for the termination.”

65. In the instant case the Employee acted on the e-mail she had received **“JF2”**.

66. We look now at section C58 (2) of the Labour Code which provides the test to be used in judging the fairness of a dismissal. It reads:

“The test, generally, for deciding whether or not a dismissal was unfair is whether or not, under the circumstances, the employer acted unreasonably or reasonably but, even though he acted reasonably, if he is mistaken as to the factual basis for the dismissal, the reasonableness of the dismissal shall be no defence, and the test shall be whether the actual circumstances which existed, if known to the employer, would have reasonably led to the employee's dismissal.”

67. (a) The Employer himself gave evidence that the persons involved namely, the Employee, Ms. Etherington and himself were acquainted

with one another for several years. The Employee stated that she had a previous working relationship with the Employer's principals. After these many years of a good association and working relationship the Employer would have been familiar with the Employee's manner of behaviour prior to signing the contract of employment.

- (b) If complaints were received against the Employee the reasonable course of action, whether the complaints were out of character or not, would have been to investigate them, to hear both sides, giving the Employee an opportunity to be heard in her defence, and a written warning with an opportunity within a time-frame to demonstrate improvement as provided in the Labour Code at Section C59 (2).
- (c) Of course the Employer always reserved the right of dismissal in certain relevant circumstances.

68. In this case the Court received evidence from both sides that the Employee, after years of acquaintance and a good working association with the Employer was summarily dismissed, albeit with the offer of one month's pay in lieu of notice, not in a personal interview, but by telephone, followed by e-mails. The Court does not find that this is a course of action which a reasonable employer would take.

69. The finding of the Court is that the termination of Ms. Finch's employment was unfair.

THE THIRD ISSUE

If the termination was unfair what award should be made?

70. A person whose employment has been unfairly terminated is entitled to compensation.

71. In this case the Employee was employed pursuant to a 7-month contract effective “*5th October, 2006 through to the end of April 2007*”. Although it was a freelance position the Employee, upon signing the contract had a right of expectation that, subject to a legal cause, she would receive the agreed monthly payment of E. C. \$6,750 until the end of April, 2007. The Employer submitted, without evidence – documentary or otherwise – that to his knowledge the Employee worked for another company while in his employ. This was her right under the contract. She received EC\$3,375.00 only while employed with the Employer.

72. Any person whose employment has been terminated is required to make every effort to mitigate his/her loss. The Court is satisfied that the Employee made efforts to mitigate her loss and received another freelance position in December, 2006. It was her evidence that her monthly salary since then was approximately \$2,000 to \$2,500. In his closing submissions Mr. Egbert Joseph, on her behalf, represented that her earnings at that time were approximately \$2,500 to \$3,000 monthly. The Court therefore uses the figure of \$2,500 as her monthly earnings from December, 2006 to April, 2007. She is therefore entitled to receive the following award.

Salary

Salary for October 5-31, 2006(\$6,750/31x27)	\$ 5,879.03
Salary for the months of November, 2006 – April, 2007 (6 months)	<u>\$40,500.00</u>
TOTAL	\$46,379.03
Less amount received	<u>\$ 3,375.00</u>
TOTAL	\$43,004.03
Less amount received in mitigation from Mid December, 2006 to 31 st April, 2007 ((\$2,500x4.5 months)	<u>\$11,250.00</u>
TOTAL	<u>\$31,754.03</u>

Other Benefits

73. In her evidence the Employee stated that she had not received certain refunds to which she was entitled under the terms of the contract. No details of the expenses incurred were given to the Court. Thus no award is made in this connection.

74. The contract did not provide for any other benefits.

75. The only other consideration is that of manner of dismissal. As stated in **Maundy P. in Leslie Emanuel v Royal Bank of Canada, Reference No. 3 of 1994**, for this issue to be considered it *“has to be shown that the Employee was made less acceptable to potential employers or exceptionally*

liable to selection for dismissal” In the instant case the Employee received employment, although not at the same salary, within two months of termination. No award is therefore made under this head.

76.The Employee and her representative were required to appear in Court on the days set for the hearing on November 6, 13, 20, 2008 and twice on March 16, 2009 because Mr. Keeling did not appear in the morning. A request was made by the court for the Employer to submit its Memorandum and Witness Statement. There was no compliance with the request until November 25 and 27, 2008. In the circumstances the Court finds it reasonable to award Costs to the Employee in the amount of \$1,000.00.

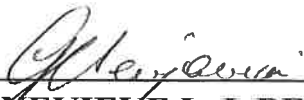
CONCLUSION

77.The Court arrived at the conclusions determined herein having taken into consideration, *inter alia*, the evidence of the Employee and the evidence of the Employer, the demeanour of the parties, the submissions presented by the representatives of the Employee and the Employer, the written pleadings, the Labour Code, and the Industrial Court Act. It has acted in accordance with equity, good conscience and the substantial merits of the case, having regard to the principles and practices of good industrial relations.

78.The Court has determined that the Employee’s contract was unfairly terminated.

79. The Employer shall, therefore, pay to the Employee the sum of E. C. \$31,754.03 as detailed at **paragraph [73]** above. In addition the Employer shall pay to the Employee her costs in the sum of \$1,000.00. The total sum of \$32,754.03 shall be paid by the Employer to the Employee on or before the 31st day of May, 2010.

Dated this the 26th day of April, 2010



GENEVIEVE L. I. BENJAMIN
Chairman

I agree



JESSIE F. KENTISH
Member

I also agree



OSCAR A. FREDERICK
Member